No. 08-17213

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOSE GUEVARA,

Plaintiff-Appellee-
Cross-Appellant,

LUIS ALFREDO PERCOVICH,

Intervenor-Appellant,

v.

REPUBLICA DEL PERU and
MINISTERIO DEL INTERIOR DEL PERU,

Defendants-Appellees-
Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REPUBLICA DEL PERU

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of his knowledge, the following persons, in addition to those listed in appellant's and appellee's opening briefs, are the only ones who may have an interest in the outcome of this case:

Nicholas Bagley, Attorney, U.S. Department of Justice;

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STATEMENT REGARDING ORAL ARGUMENT

Because the panel already heard oral argument from the parties on January 13, 2010, the United States does not request oral argument. Should the Court schedule a second oral argument in the case, the United States believes that its participation would be useful to the Court and would request ten minutes of argument time.

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INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29(a), the United States files this *amicus curiae* brief in order to urge the Court to reverse the district court's judgment against the Republic of Peru under either international comity principles or the act of state doctrine. These justiciability doctrines are fully applicable here and foreclosed the district court from issuing an $8.2 million judgment against Peru that overrode the

decisions of high-level Peruvian government officials made in connection with the apprehension of a corrupt former Peruvian intelligence chief who had been hiding in Venezuela.

The district court's substantial judgment against Peru would, if affirmed, become a serious irritant in the United States' bilateral relationship with that nation. The judgment represents a serious affront to Peruvian sovereignty and is precisely the type of ruling that a United States court should not make because it hamstrings the Executive Branch's ability to carry out its foreign-relations responsibilities. Reversal under these circumstances is entirely consistent with precedent from the Supreme Court, this Court, and its sister Circuits applying the international comity and act of state doctrines.

We have taken the highly unusual step of filing an *amicus* brief after oral argument because the federal government has a profound interest in preventing the district court's judgment from undermining our nation's relationship with a stable democratic partner in South America. Moreover, the United States operates its own highly successful international reward programs, and the judgment here raises the troubling specter of foreign courts overriding decisions made by U.S. law enforcement and diplomatic

officials.

As discussed below, this case arose because the President of Peru issued a formal executive decree offering a $5 million reward for information leading directly to the capture of Vladimiro Lenin Montesinos Torres, the former head of Peru's intelligence agency. The Peruvian President established a Special Committee of high-ranking officials within the Peruvian Interior Ministry to implement this reward program. The committee was vested with exclusive authority to issue the reward, and provision was made for the committee to operate confidentially. In addition, the committee was empowered by the Peruvian President to make determinations concerning competing claims to the reward, and to decide how the available funds should be divided if more than one claimant qualified for compensation.

Plaintiff-appellee Jose Guevara was a Venezuelan intelligence official who offered information relating to Montesinos' whereabouts while in the temporary custody of the FBI as part of a federal criminal investigation of his conduct. Guevara provided this information while in the United States on a short trip. Not long after, he filed a claim in Peru for the $5 million reward.

The Peruvian Special Committee rejected Guevara's claim, reasoning that Venezuelan authorities had taken Montesinos into custody and that no evidence connected Guevara's information with those authorities. Guevara is now pursuing his claim against Peru in a United States court.

Notwithstanding the Peruvian government's authoritative resolution of Guevara's claims, the district court here ruled that the Special Committee's determination was incorrect and that Peru must therefore pay Guevara the entire $5 million reward, plus $3.2 million in interest. This ruling sets aside two Peruvian government decisions: (1) the conferral of exclusive authority on the Special Committee to administer the reward program; and (2) that committee's ultimate conclusion that Guevara had not demonstrated his entitlement to the reward.

The adjudication in a United States court of the validity of a sovereign determination by a foreign administrative tribunal is precisely what the international comity and act of state doctrines are meant to avoid. And, as alluded to already, the district court's judgment exposes actions taken by the United States in implementing parallel reward programs to reversal by foreign courts. This type of foreign court ruling would be especially problematic because U.S. officials make reward decisions on the

basis of competing considerations such as the nature, quality, and accuracy of the information provided; how that information ties in with confidential information that the United States already had; the degree to which the information actually assisted the government; the need to protect sensitive sources and methods; the effect of payment on our national security interests; and whether non-payment would undermine the effectiveness of the program. Foreign judicial pronouncements on governmental decisions made by U.S. officials concerning these factors would obviously be inappropriate and unwelcome.

Thus, drawing either on principles of international comity or on the act of state doctrine, this Court should reverse the judgment against Peru. This Court should do so as an exercise of its discretion, whether or not Peru presented these arguments adequately to the district court. Full and proper application of these principles is of immense importance to the interests of the United States, and those interests should override any procedural problems created by Peru's litigation strategy.

STATEMENT OF THE CASE

In this brief, except where otherwise expressly noted, the United States takes the description of the facts purely from Guevara's complaint, this Court's opinion in *Guevara* v. *Republica del Peru*, 468 F.3d 1289 (11th Cir. 2006), and the uncontested facts described in the district court record.

I. Factual Background.

During the 1990s, Vladimiro Lenin Montesinos Torres served as an adviser to Peruvian President Alberto Fujimori and as the head of Peru's National Intelligence System. In that capacity, Montesinos allegedly committed numerous crimes, including (but not limited to) bribery, influence peddling, drug trafficking, money laundering, unlawful arms trafficking, and murder. He was caught on videotape offering a bribe to a legislator-elect in September 2000, which led almost immediately to the collapse of the Fujimori government.

Montesinos went into hiding and an international manhunt ensued. In April 2001, the President of Peru issued an Emergency Decree offering a $5 million reward to "the person or persons who provide(s) accurate information that will directly enable locating and capturing" Montesinos.

DE 119-2, at 2 (Emergency Decree).[1] The decree established a Special High Level Committee within the Peruvian Ministry of the Interior "for the purpose of evaluating information received and deciding on granting the financial reward." *Id*. And "accurate information" was defined to mean information "provided through any means to the Special High Level Committee and which enables locating and capturing" Montesinos. *Id*. The four-person committee was made up of the Minister of the Interior, his immediate subordinate, the Director General of the National Police, and the Director General of Intelligence for the Interior Ministry. *Id*. "In the event several persons provide the said information," the decree provides, "the financial reward shall be divided among them." *Id.* The Special Committee was charged with taking "measures for the protection and safety of the informant"; consistent with that need for confidentiality, "[a]ll information involving application of this Emergency Decree is secret." *Id*. at 2-3.

In the meantime, Montesinos had secretly taken refuge in Venezeula. A member of the Venezuelan intelligence service, plaintiff-appellee Jose

[1] "DE" refers to the docket entry number on the district court docket.

Guevara, provided Montesinos with a safe house and a security detail. As he ran short on money, Montesinos "sent Guevara on trips to Lima, Bogota, Miami, and Nassau, Bahamas, in a desperate search for more money." DE 333, at 3. On Guevara's third such trip to Miami in June 2001 to meet with an employee at a Miami bank on Montesinos' behalf, the FBI took Guevara into custody.

According to Peru, Guevara was "charged with fraud against the United States and extortion of the family of a bank official * * * in an effort to access $43 million of Montesinos' deposits at a Miami bank." Appellant's Br. 3. The FBI told Guevara that the case in the United States would be dropped if he provided information concerning Montesinos' whereabouts. The FBI agents in Miami consulted over the telephone with a Peruvian official, who confirmed that a $5 million reward for information leading to Montesinos' capture was available to Guevara. *See* DE 230, at 3. In light of his discussions with the FBI and Peru's reward program, Guevara decided to cooperate, and he placed a telephone call to a colleague in Venezuela. *Id*. Montesinos was arrested the following day by Venezuelan authorities. *Id*.

Guevara then sought to collect the reward in Peru. In 2002, the

Peruvian government's Special Committee agreed to process Guevara's request for the reward. Guevara was not the only claimant, however: a handful of others—including the bank employee with whom Guevara met in Miami—also submitted claims.

In 2005, the Special Committee notified Guevara that his request for the reward had been denied. DE 201-9. The Peruvian government did not in its notice provide an explanation for its decision; Peru instead informed Guevara that, pursuant to the terms of the Emergency Decree, that information was considered confidential. Guevara was nevertheless invited "to read the Resolution related to your request" at a Peruvian ministry office. *Id*. In a declaration submitted to the district court, a former Peruvian Minister of the Interior and member of the Special Committee explained that Guevara's reward claim had been rejected because "the acts of the Venezuelan military were an intervening event that broke the chain of causation" between Guevara's assistance and Montesinos' capture. Costa Decl., DE 326-4 ¶16; *see also* Rospigliosi Dep., DE 201-3, at 21.

II. Judicial Proceedings in the United States.

In 2004, Guevara filed a breach-of-contract action in a Florida state court against Peru to recover the $5 million reward. The case was removed

to the United States District Court for the Southern District of Florida, which concluded that Peru was immune from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1604, 1605. In the district court's view, offering a reward for the capture of a criminal was a sovereign, and not a commercial, act. (Shortly before the district court issued its decision, the Venezuelan Supreme Court of Justice had rejected a separate claimant's suit effort to sue Peru for the reward in Venezuela on the similar ground that the Peruvian President's issuance of the Emergency Decree was a sovereign act not subject to challenge in Venezuelan courts. *See* Decision of February 17, 2004 (available at http://www.tsj.gov.ve/decisiones/jspa/Febrero/03-1314.htm)).

This Court reversed in November 2006. *Guevara* v. *Republica del Peru*, 468 F.3d 1289 (11th Cir. 2006). The Court found that Peru's reward offer was a unilateral offer to enter into a contractual relationship. And under the FSIA, this Court held, a contract for the provision of information is a commercial contract and is not inherently sovereign. The case was therefore remanded for further proceedings.

On remand, the district court granted summary judgment against Peru. In the court's view, the Special Committee's 2002 resolution

indicating that Guevara's claim had been accepted for consideration established that Guevara had, in fact, provided information that led directly to Montesinos' capture. DE 230, at 6-7. The court rejected Peru's argument that the capture of Montesinos by Venezuelan authorities, and not by Peruvian authorities, raised an issue of fact as to whether Guevara's provision of information had led directly to Montesinos' arrest. "In the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated." *Id*. at 8. The court also rejected Peru's evidence regarding the Special Committee's deliberations, and it closed its analysis by criticizing the secrecy of the proceedings, discounting for that reason the significance of Peru's formal letter rejecting Guevara's claim. *Id*. at 9-10.

The district court subsequently entered final judgment against Peru. Under that judgment, the court ordered Peru to pay Guevara the entirety of the $5 million reward, plus more than $3.2 million in pre-judgment interest. DE 346. Peru appealed. DE 349. In its opening appellate brief to this Court, Peru argues, among other things, that international comity and the act of state doctrine should have prevented the district court from

entering a judgment against Peru contradicting the decision by the Peruvian government that Guevara was not entitled to payment of the reward. Appellant's Br. 40-42.

SUMMARY OF ARGUMENT

In practical effect, Jose Guevara's lawsuit against the Peruvian government in the United States is both a collateral attack in another nation's courts on the Special Committee's decision that he was not entitled to the reward and a challenge to the authority of the Peruvian President to delegate to the Special Committee the exclusive authority to administer the reward program. Not only would the district court's order requiring the Peruvian government to pay the reward violate the act of state doctrine, which the Supreme Court has held to have "constitutional underpinnings." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964). It would also, if affirmed, introduce considerable friction into the United States' bilateral relationship with Peru. To protect the prerogatives of the Executive Branch in its conduct of foreign affairs, both the act of state doctrine and principles of international comity generally preclude U.S. courts from reviewing and overriding the sovereign decisions of foreign states and foreign tribunals. Particularly because this judgment against Peru presents two serious

foreign-relations dilemmas for the United States, the doctrines are fully applicable here.

First, the district court's entry of a multi-million djudgment against Peru would, if affirmed, become an irritant in the United States' relationship with that country. Peru justifiably believes that the district court overstepped its authority when it overrode the authoritative decision of the Special Committee denying Guevara's claim for the reward. Second, the United States itself administers several reward programs for the capture of international fugitives. To preserve the ability of U.S. officials to make delicate and context-sensitive judgments about whether an individual is or is not entitled to a reward, decisions made pursuant to those reward programs are generally not subject to judicial review even in domestic courts. Yet the district court's judgment stands as an invitation to *foreign* courts to accept jurisdiction over litigation challenging decisions by U.S. officials concerning reward claims. The threat of oversight by foreign courts would not only seriously hamper the administration of these important reward programs; it would also present the risk that foreign courts will demand the release of confidential information relating to ongoing law enforcement investigations—or even order the U.S. to disclose

classified information.

The United States therefore urges this Court to reverse the judgment against Peru on the ground that it accords neither with international comity nor with the act of state doctrine. We recognize that Peru has argued in the alternative that its commercial activity lacked a sufficient nexus to the United States to fall within the commercial activity exception. Because resolving the nexus argument in this very unusual case could have far-reaching implications for future litigation, we ask the Court to reverse the judgment on international comity and act of state grounds, which themselves render the suit non-justiciable.

ARGUMENT

I. International Comity and the Act of State Doctrine Require Reversal of the District Court's Judgment Against Peru.

As explained above, a high-level committee within the Peruvian government vested with the exclusive authority to administer a $5 million reward for information leading directly to Montesinos' capture considered and rejected Guevara's claim for that reward. In nonetheless ordering Peru to pay Guevara the entirety of the $5 million reward, plus millions in interest, the district court contradicted the determination of a foreign

tribunal and arrogated to itself authority that the President of Peru had delegated to that tribunal. As we explain below, principles of international comity demanded that the district court abstain from overriding the decision of the Special Committee to reject Guevara's claim for the reward. And the act of state doctrine prohibited the district court from invalidating the Peruvian President's establishment of an exclusive mechanism for administering the reward.

A. International Comity.

"International comity"—"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation," *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895)—has two forms. Prescriptive comity (also called the "comity of nations") is a doctrine under which courts construe "ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164 (2004). The second form—at issue in this case—is the "comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). Although the comity of courts is an abstention

doctrine that is typically invoked when a U.S. court declines to exercise jurisdiction in deference to parallel judicial proceedings in a foreign state, *see Victrix S.S. Co., S.A.* v. *Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir.1987), it applies equally in cases involving the decisions of foreign administrative tribunals. *See Ungaro-Benages* v. *Dresdner Bank AG*, 379 F.3d 1227, 1237-40 (11th Cir. 2004) (finding that international comity required dismissal of domestic claims in deference to the compensation determinations of a foreign administrative tribunal).

In deciding whether to defer on comity grounds to the decision of a foreign tribunal, this Court weighs at least four factors: "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, * * * (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just"; and (4) "whether the central issue in dispute is a matter of foreign law and whether there is a prospect of conflicting judgments." *Id.* at 1238. The strength of the United States' interests and the interests of the foreign state are also important to the analysis. *Id.* at 1239.

These factors compel application of the comity doctrine to preclude

review in U.S. courts of Peru's determination that Guevara was not entitled to the reward. DE 201-9. Of greatest significance, the district court's judgment not only "creates a prospect of conflicting judgments," but actually *does* conflict with the Special Committee's decision. The conflict is particularly striking because the central issue in dispute in this case is whether Guevara satisfied the terms of the *Peruvian* reward program.

The potential for conflict runs much deeper than the district court's decision merely to overturn a single decision of the Special Committee. The Peruvian President's Emergency Decree caps the total reward amount at $5 million. In the event that more than one person provided information leading to Montesinos' arrest, the Special Committee was charged with "divid[ing] among" those persons the $5 million sum. DE119-2, at 2. The district court's $8.2 million judgment against Peru, however, not only exceeds that $5 million cap. More significantly, it means that other courts—both in the United States and elsewhere—could enter another judgment awarding the same $5 million. That result would thwart the Peruvian government's effort to cap the total amount it disbursed in connection with the Emergency Decree, and to provide for appropriate divisions where necessary.

The Special Committee's determination is precisely the sort of decision by a foreign governmental body to which U.S. courts owe deference. Its competence is beyond dispute: the Special Committee comprised four high-level Peruvian officials from law enforcement and the Ministry of the Interior, including the Minister himself. DE 119-2, at 2. Their accumulated expertise in law enforcement and intelligence put them in a very strong position to ascertain whether certain information did or did not lead directly to Montesinos' capture. And so far as the evidence in the record shows, the Special Committee was fully authorized under Peruvian law to make this determination and its conclusion lay within its lawful discretion.

In the district court, Peru submitted a declaration from a former Peruvian Minister of the Interior who served on the Special Committee from 2001 to 2003. That declaration described the Committee's deliberations, its collection of information, its consideration of testimony, and its repeated requests for more information from the FBI and Guevara's counsel about Guevara's assistance. *See* Second Decl. of G. Costa Santolalla, DE 326-4. This former minister stated without contradiction that Guevara's reward claim was rejected because the available evidence did

not support the conclusion that Guevara provided the information leading directly to Montesinos' capture. *Id*. ¶ 16. Instead, "the Special Committee concluded that the acts of the Venezuelan military were an intervening event that broke the chain of causation between Mr. Guevara's telephone call * * * and the arrest of Montesinos." Costa Decl., DE 326-4, ¶ 16. The Minister's declaration was corroborated by a deposition from another former Peruvian Minister of the Interior who served on the Committee from 2001 to 2002 and from 2003 to 2004. Depo. of Fernando Rospigliosi, DE 201-3, at 21.

Nothing in the record suggests that the Committee's determination was tainted by fraud or otherwise violated United States public policy. Indeed, it would be perfectly consistent with U.S. policy to deny a reward claim in a case in which insufficient evidence connected the information to the eventual arrest, a third party's intervention made the proffer of information irrelevant, or a claimant failed to satisfy the terms of the reward offer. Just as decisions based on such factors by U.S. officials are not amenable to challenge in foreign tribunals, so too should Peru's determination be insulated from collateral attack in U.S. courts.

Deference to the Special Committee's decision is all the more

appropriate given that the district court's invalidation of that decision, if affirmed by this Court, could adversely affect the United States' relationship with Peru. That is particularly true here because the target of the $5 million reward was not some common criminal. The Montesinos affair was an international cause célèbre. Montesinos was an infamous former high-level official accused of (and in some cases convicted of) "crimes against government administration, public corruption, embezzlement, crimes against persons, aggravated murder, national security and other[crimes]." DE 119-2, at 2. His arrest was the precipitating event in the collapse of the Fujimori presidency, and both Montesinos and Fujimori have since been convicted in Peruvian courts of serious abuses of power. *See id*. (stating in the Emergency Decree that various officials committed illegal acts between 1990 and 2000, and that Montesinos "stands out among said officials" because of his "involve[ment] in serious crimes which affect the security of the State and society overall").

Even the circumstances of Montesinos' capture were a source of foreign-relations controversy. Although President Hugo Chavez and other Venezuelan officials claimed that Venezuela was single-handedly responsible for Montesinos' arrest, many Peruvians suspected that

Venezuelan authorities had knowingly harbored him. *See* Clifford Krauss, *Former Spy Chief of Peru Captured in Venezuela Lair*, N.Y. Times, June 25, 2001. That the Special Committee's decision arose against the backdrop of a sensitive regional political controversy provides a particularly compelling reason to defer to Peru's handling of the reward question. Given the delicacy of the issue, the Special Committee was entitled to do its work without second-guessing from courts in other countries, including the United States.

Further, and contrary to the district court's view, DE 230, at 9-10, the fact that the Special Committee's reasoning was confidential provides no reason to question its conclusions. As the Emergency Decree makes clear, the evidence presented to the Committee, its deliberations, and its reasoning were to be kept secret in order to protect the safety of claimants. *See* DE 119-2, at 2-3 (directing the Special Committee to adopt specific measures "for the protection and safety of the informant," authorizing claimants to use pseudonyms, and requiring "[a]ll information involving application of this Emergency" to be kept "secret"). Despite these valid concerns, the Special Committee expressly invited Guevara to review the record of its decision within a Peruvian ministry. DE 201-9.

In any event, the Peruvian government's interest in preserving the confidentiality of proceedings touching on sensitive law enforcement functions mirrors the United States' own interest in protecting informant confidentiality and preserving the secrecy of classified information. *See* 5 U.S.C. § 552(b)(1), (7) (protecting classified information and certain "records or information compiled for law enforcement purposes" from disclosure under the Freedom of Information Act); *cf. Tenet* v. *Doe*, 544 U.S. 1, 8 (2005) (holding that "[p]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential" (internal quotation and emphasis omitted)).

Over and above these concerns, the United States has a substantial interest in forestalling reciprocal litigation in foreign tribunals that would interfere with the administration of U.S. reward programs. The State Department, for example, administers three rewards programs that target some of the most dangerous classes of international fugitives: Rewards for Justice, the Narcotics Rewards Program, and Rewards for Information Concerning Individuals Sought for Serious Violations of International Humanitarian Law Relating to the Former Yugoslavia or Rwanda. *See* 22

U.S.C. § 2708.

These three programs fund payments for information leading to the arrest of international terrorists, narco-traffickers, and war criminals, respectively. Under the auspices of the reward programs, the Secretary of State determines, with input from the Interagency Rewards Committee (a group composed of Executive Branch officials), whether to pay a reward and, if so, the amount to be paid. The Department of Defense administers a similar reward program for persons providing "information or nonlethal assistance" in aid of an operation against international terrorism. 10 U.S.C. § 127b(a).

Under all of these U.S. reward programs, a decision to grant or deny a reward is by law "final and conclusive and is not subject to judicial review." 22 U.S.C. § 2708(j); 10 U.S.C.§ 127b(g). This policy makes eminent sense. The federal officials who administer these reward programs must balance a range of competing considerations in deciding whether to grant or deny an individual's claim. As noted earlier, those considerations include the nature and quality of the information provided, the accuracy of the information, whether the individual providing the information is eligible for payment under the terms of the relevant statute or regulation,

whether the same or comparable information was obtained from other sources, the degree to which that information actually led to the apprehension of a suspect, the need to protect sensitive sources and methods, whether payment is consistent with national security, and whether nonpayment would undermine the effectiveness of the rewards program. Major and obvious problems would arise if these U.S. reward program decisions were subject to invalidation in foreign courts.

Yet the district court's judgment here seriously threatens to expose decisions that Congress insulated from review in domestic courts to adjudication in foreign tribunals. The risks of such reciprocal litigation are manifold. Foreign courts cannot be counted upon to be sensitive to the wide range of concerns that U.S. officials must take into account in deciding whether or not to grant a reward. And federal officials would likely feel constrained in the exercise of their duties if their decisions were subject to later judicial review in a foreign state. In addition, in attempting to decide whether the terms of a reward program were satisfied, foreign courts might well order intrusive discovery into what precisely a confidential informant told law enforcement officials and how that information did (or did not) satisfy the terms of the reward program. And

courts in other countries may be unsympathetic to U.S. efforts to invoke the law enforcement privilege or to resist the disclosure of classified information.

As if to illustrate the point, the district court in this very case was asked by both parties to compel the FBI to disclose extraordinarily sensitive law enforcement information. *See, e.g.*, DE 289 (providing the FBI's response to Peru's motion to compel discovery). Foreign courts would certainly be presented with precisely the same sorts of requests. Furthermore, the district court rested its decision to grant judgment against Peru in part on the *absence* of evidence in the record to rebut the inference that Guevara provided information leading to Montesinos' arrest. *See* DE 230, at 8 (stating that, "[i]n the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated"). That line of reasoning suggests that a domestic law enforcement agency's resistance to discovery demands could justify a foreign court's decision to overrule a U.S. determination that a particular claimant is not entitled to a reward.

For all of these reasons, international comity precluded the district

court from undertaking a review of the factual and legal determinations of the Special Committee. *See Hilton*, 159 U.S. at 202-03 (holding that where "comity of this nation" calls for recognition of a judgment rendered abroad, "the merits of the case should not * * * be tried afresh").

B. Act of State Doctrine.

For many of the same reasons, the district court's judgment against Peru violates a related but separate doctrine—the act of state doctrine. "[I]n its traditional formulation," the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964).

The doctrine was "once viewed * * * as an expression of international law, resting upon the highest considerations of international comity and expediency," *W.S. Kirkpatrick & Co., Inc.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (internal quotation marks omitted), but was described by Justice Harlan in *Sabbatino* as a doctrine with "'constitutional' underpinnings," reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, *Sabbatino*, 376 U.S. at 423.

In this case, the district court's judgment granting Guevara's claim for the reward invalidated Peru's ultimate decision to deny Guevara's claim. That by itself violated the act of state doctrine. But the court's judgment also invalidated the President of Peru's establishment of a specialized tribunal vested with sole responsibility for determining in confidential proceedings whether an individual had satisfied the condition for receiving the reward.

Peru clearly intended the Special Committee's determinations to be exclusive. The four-person Committee was established "for the purpose of evaluating information received and deciding on granting the financial reward," and the reward was due only if information was "provided through any means to the Special High Level Committee." DE 119-2, at 2. Per the Emergency Decree, the Special Committee alone was charged with assessing the accuracy of the information and with providing protection to an informant who was in danger because of his cooperation. *Id.* And the Emergency Decree contemplated that the Special Committee would divide the total reward among the claimants entitled to it. *Id*. at 2-3.

These provisions are in no sense compatible with having multiple tribunals in different countries address a claimant's entitlement to the

reward. Thus, in assuming the authority to dispense the $5 million reward, the district court invalidated the President of Peru's delegation of exclusive decision-making authority to the Special Committee. The act of state doctrine serves to protect against precisely that sort of invalidation. *See Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897) (holding that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory"). That is particularly so where, as here, the Peruvian President's delegation involved questions relating to the capture of an infamous former government official and where the district court's judgment would, if affirmed, create diplomatic friction. *See Kirkpatrick*, 493 U.S. at 409 (holding that "the policies underlying the act of state doctrine should be considered in deciding whether" it should be applied).

The application of the act of state doctrine here is in no way undermined by this Court's prior conclusion that the Peruvian reward offer constituted a commercial contract. The law of this Circuit is that "there is no commercial exception to the act of state doctrine." *Honduras Aircraft Registry, Ltd.* v. *Honduras*, 129 F.3d 543, 550 (11th Cir. 1997); *Glen* v. *Club Mediterranee*, S.A., 450 F.3d 1251, 1254 n.2 (11th Cir. 2006) (same); *see*

also International Association of Machinists v. *OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981).

Even assuming that a commercial activity exception existed, the only potential commercial activity at issue here was Peru's extension of the reward offer. The Peruvian President's distinct decision to delegate exclusive authority for deciding who is (and is not) entitled to the reward was non-commercial sovereign activity. *Cf. Horowitz* v. *United States*, 267 U.S. 458, 461 (1925) (distinguishing between the United States' "public and general acts as a sovereign" and those acts undertaken in connection with a commercial contract). Private parties cannot and do not delegate to specialized committees composed of high-ranking government officials the power to adjudicate whether the conditions of a law-enforcement reward offer have been satisfied. *See Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that an act is commercial only if "the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce" (internal quotation marks omitted)). Under the act of state doctrine, that sovereign delegation should not be subject to review in United States courts. *Cf. Society of Lloyd's* v. *Siemon-Netto*, 457 F.3d 94,

102-103 (D.C. Cir. 2006) (holding that the act of state doctrine barred an argument that an English statute unlawfully delegated authority to Lloyd's, a private company).

C. Forfeiture.

The parties dispute whether Peru preserved these justiciability claims in the district court. Whatever the merits of that dispute, the principle that an appellate court will not pass on forfeited arguments is "not a jurisdictional limitation but merely a rule of practice, and the decision whether to consider an argument first made on appeal is left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Dean Witter Reynolds, Inc.* v. *Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984) (internal quotations, footnotes, elision, and correction omitted).

As we have explained, upholding the judgment against Peru could have deleterious consequences both for the United States' bilateral relationship with Peru and for the administration of federal reward programs. Standing alone, those potential consequences are sufficiently serious that this Court should exercise its discretion to consider the act of state and international comity arguments. As the Seventh Circuit has noted

in a related context, "federal-state comity interests can be considered for the first time on appeal," and the case for overlooking waiver is even "stronger" when the arguments presented touch on "international comity, amity, and commerce." *Fortino* v. *Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991).

The United States has a substantial independent interest in presenting the act of state and international comity arguments to this Court, over and above what Peru may have argued. The two doctrines "aris[e] out of the basic relationships between branches of government in a system of separation of powers," *Sabbatino*, 376 U.S. at 423, and exist in part "to promote cooperation and reciprocity with foreign lands," *Pravin Banker Associates, Ltd.* v. *Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). The Court should consider and address even late-raised arguments that serve to protect the Executive Branch's prerogatives, whether or not a party has presented them.

Indeed, even if the United States were not participating, the exceptional nature of this case would warrant this Court's review of any forfeited international-abstention arguments. The strictly legal issues presented by the arguments clearly "presen[t] significant questions of

general impact or of great public concern." *Dean Witter Reynolds, Inc.*, 741 F.2d at 361; *cf. Granberry* v. *Greer*, 481 U.S. 129, 134 (1987) (noting that "principles of comity" may be "better served by addressing the merits forthwith" of forfeited arguments). This Court should therefore exercise its discretion to consider the arguments pertaining to international comity and the act of state doctrine.

II. This Court Need Not Resolve Whether Peru's Reward Offer Had a Sufficient Commercial Nexus to the United States.

As an alternative basis for reversal, Peru has argued that its reward offer bore an insufficient relationship to the United States, and that its commercial activity therefore fell outside the commercial activity exception to the immunity otherwise imposed in the Foreign Sovereign Immunities Act (FSIA).[2] As relevant here, the exception provides that a sovereign is not

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[2] When this Court previously held that Peru's extension of the reward offer amounted to commercial activity, it did not address (because it was not asked to) whether the activity bore the requisite connection to the United States. On remand, the district court declined to consider the question because it appeared to believe that this Court's prior decision "established" the district court's jurisdiction. DE 230, at 10. The nexus argument, however, implicates this Court's subject matter jurisdiction and thus remains viable. *See Harris* v. *United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) (holding that "the parties are incapable of conferring upon us a jurisdictional foundation we otherwise lack simply by waiver or procedural default").

immune from suit in any case "in which the action is based * * * upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The United States takes no position on the highly fact-bound question whether any act undertaken by Peru had a "direct effect in the United States" within the meaning of the FSIA. Nor need the Court resolve this issue, which, although it arises here in an unusual factual setting involving a foreign government's law enforcement reward program, could materially affect the scope of federal court jurisdiction over quintessentially commercial disputes between domestic corporations and foreign states. As noted, the justiciability grounds discussed above—that the judgment violates principles of international comity and the act of state doctrine—provide an alternative and sufficient basis for reversal.

There is no obstacle to addressing international comity and the act of state doctrine before resolving whether this Court has subject-matter jurisdiction. *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), requires a federal court to "prioritize [a] jurisdictional issue only when the existence of *Article III* jurisdiction is in doubt." *Chalabi* v.

Hashemite Kingdom of Jordan, 543 F.3d 725, 728 (D.C. Cir. 2008). The Supreme Court, however, "explicitly recognized [in *Steel Co.*] the propriety of addressing the merits where doing so made it possible to avoid a doubtful issue of statutory jurisdiction." *Id*. (internal quotation omitted). And although they are not jurisdictional in nature, the act of state doctrine and international comity are "threshold question[s]" designed "to preclude judicial inquiry," and as such can properly be addressed before questions of statutory jurisdiction. *Tenet*, 544 U.S. at 6 n.4.

CONCLUSION

For the foregoing reasons, the judgment entered by the district court against the Government of Peru should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2010, I caused an original and six copies of the foregoing brief to be filed with the Court by Federal Express. On the same date, I also caused an electronic copy to be filed with the Court, and caused copies to be served on the following counsel by Federal Express and email:

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(5) and (6), I certify that this brief has been prepared in a fixed-spaced typeface using Corel WordPerfect 12 in 12-point Book Antiqua font. I further certify that pursuant to Fed. R. App. P. 32(a)(7)(B) that the foregoing brief contains 6,479 words, according to the word count of Corel WordPerfect 12. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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MARCH 2010